

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

VS.

CRIMINAL NO. 4:96CR062-D

JERRY W. GILLESPIE, CHARLES
W. JAMES, GUARANTY AGRICULTURAL
CREDIT CORPORATION

ORDER DENYING MOTION TO DISMISS

This cause comes before the court upon the motion of the defendants to dismiss the indictment against them. The defendants argue that the government suppressed highly material and exculpatory evidence in violation of their duty to disclose as set forth in Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S. Ct. 1194 (1963). They further assert that such suppression also violated the Giglio doctrine which requires the government to make available any evidence which tends to impeach a witness adverse to a criminal defendant. Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972); see Lawrence v. Lensing, 42 F.3d 255, 257 (5th Cir. 1994) (interpreting Brady to also provide for disclosure of impeachment evidence). The government responds that it did not suppress any evidence in violation of Brady or Giglio and that the evidence to which the defendants hinge their motion to dismiss is neither material nor exculpatory. After the submission of briefs and evidence and a hearing held on April 23, 1997, the matter is ripe for resolution.

DUTY TO DISCLOSE

In Brady v. Maryland, the United States Supreme Court held that

suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

373 U.S. at 87. The Court reasoned that the prosecutor's main duty is to ensure that justice is served,

and that the guilty must not be convicted at the expense of a fair trial. Brady, 373 U.S. at 87-88. The Fifth Circuit has specifically delineated the three factors which a defendant must demonstrate in order to prevail on a Brady claim: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defense; and (3) the evidence was material. Lawrence, 42 F.3d at 257. The court is of the opinion that the defendants in the case *sub judice* have failed to present evidence sufficient to prevail on their Brady claim.

. *Suppression by Government*

. Trailer Papers

The defendants must first demonstrate the prosecutor knew of the alleged exculpatory evidence and failed to disclose its existence. The proof as to this issue indicates that the government had no knowledge of most of the documents¹ in question until informed of their existence by defendants' counsel. The majority of the documents in question were located in a trailer which belonged to defendant Guaranty Agricultural Credit Corporation ("GACC") and was situated on land belonging to that same defendant. Defendants' counsel discovered these materials approximately two weeks prior to the scheduled retrial² and alerted the prosecution to the find.

The government asserts that it had no prior knowledge of the trailer papers. The court is convinced that the prosecutor himself was unaware of these documents. However, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the

¹The defendants also contend that the United States should have provided them with the grand jury testimony of Maureen Speaks. As the prosecutor was aware of Ms. Speaks' testimony, the court reserves discussion concerning this evidence.

²The defendants were tried before this court on October 28, 1996. However, the jury was unable to reach a unanimous decision after a two-week trial and the court declared a mistrial. United States v. Jerry M. Gillespie, et al., Criminal No. 4:96CR062-D (N.D. Miss. Nov. 15, 1996) (Davidson, J.) (Order Declaring Mistrial).

government's behalf in the case, including the police.” Kyles v. Whitley, --- U.S. ---, 131 L.Ed.2d 490, 508-09, 115 S. Ct. 1555 (1995). During the hearing of this matter, Don Carter³ testified that on or about October 27, 1994, he entered the trailer in question as part of his investigation. He remained in the trailer approximately 45 minutes to an hour and did not again investigate its contents. Indeed, the evidence indicates that no government agent revisited the location until subsequent to the defendants' discovery. Furthermore, Carter stated under oath that he could not recall viewing any of the alleged exculpatory materials and that the trailer was neat and organized when he conducted his investigation, contrary to its condition when defendants' counsel entered it and found paper strewn all about.

In light of the physical evidence and testimony, the court is of the opinion that the government was unaware of the existence of these documents. Carter remained in the trailer for no more than one hour, when it has taken the defendants weeks to review and organize the voluminous records found there. Indeed, as of the hearing before the undersigned, the defendants had not even completed their compilation of all of the documents. Furthermore, the testimony indicated that the records in question were not located within the trailer in 1994 when Carter visited it. As such, the defendants have failed to demonstrate that the government knew of the trailer documents and suppressed them.

Alternatively, the Fifth Circuit has opined that a prosecutor has no duty under Brady to disclose information the defendant could obtain from other sources by exercising reasonable diligence. Brown v. Cain, 104 F.3d 744, 750 (5th Cir. 1997) (citing cases); United States v. Aubin, 87 F.3d 141, 148-49 (5th Cir. 1996) (“*Brady* does not require the prosecution ‘to conduct a

³Carter was the initial agent assigned to investigate the alleged criminal activities of these defendants. He last worked on this case in March 1995 when he was transferred to the IRS and Agent Steve Gaines replaced him as the investigating officer.

defendant's investigation or to assist in the presentation of the defense's case.'") (quoting United States v. Marrero, 904 F.2d 251, 261 (5th Cir.), *cert. denied*, 498 U.S. 1000, 111 S. Ct. 561, 112 L.Ed.2d 567 (1990)). The trailer in which the defendants discovered the documents and the land on which the trailer is situated belong to defendant GACC. Although the documents themselves supposedly belong to one of the prosecution's witnesses, T.R. Coleman, the court is of the opinion that the defendants could have discovered their existence through due diligence. The defendants' Brady claim with regard to the trailer papers fails under the first prong. See Aubin, 87 F.3d at 147 ("Aubin does not show that this information was not available to him through due diligence.").

. Grand Jury Testimony

The defendants also contend that the government should have made available the grand jury testimony of Maureen Speaks. In contrast with the trailer documents, the government did have knowledge of this evidence. However, the defendants failed to demonstrate that the prosecutor intentionally *suppressed* it. The defendants knew of Ms. Speaks and the role she played in the events in question. Yet, the defendants did not ask for her grand jury testimony until after the conclusion of the first trial, at which time the government provided it. The proof indicates that the defendants specifically requested the transcripts of other witnesses' grand jury testimony, but did not do the same with regard to Ms. Speaks' testimony. However, the Supreme Court has held that a defendant need not make a specific request for materially favorable evidence for Brady purposes. Kyles, 131 L.Ed.2d at 505 (citing United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985)). Thus, this court turns to the remaining two prongs of the Brady doctrine.

. *Favorable and Material*

After reviewing Ms. Speaks' grand jury testimony, this court is unable to hold that her testimony is clearly exculpatory. While it may be useful for impeachment purposes for both Ms.

Speaks and T.R. Coleman, the undersigned is reluctant to find that it is sufficiently favorable so as to alert the prosecution that Brady (or Giglio) requires its disclosure. In addition to its favorability, the burden rests on the defendants to also demonstrate such evidence's materiality. Kyles, 131 L.Ed.2d at 506-08. Materiality has been defined to mean a "reasonable probability of a different result." Id. at 506 (noting such is shown when "the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'"); Aubin, 87 F.3d at 148 ("Evidence is material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'") (quoting Bagley, 473 U.S. at 682). The defendants have failed to show that it is reasonably probable that the disclosure of Ms. Speaks' grand jury testimony (and/or the trailer papers) would have brought about a different result. The defendants' motion to dismiss thereby fails.

It is therefore ORDERED that:

) the motion of the defendants to dismiss this criminal action against them is hereby
DENIED.

SO ORDERED this ____ day of May 1997.

United States District Judge